

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOSEPH PAUL BEHARI, JR.** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 822015  
New York State Personal Income Tax under Article 22 :  
of the Tax Law for the Year 2000. :

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Petitioner, Joseph Paul Behari, Jr., filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2000.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel), brought a motion dated April 8, 2008 seeking summary determination in the above-referenced matter pursuant to Tax Law § 2006(6) and section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on May 8, 2008, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claim for refund pursuant to Tax Law § 687(a).

***FINDINGS OF FACT***

1. Petitioner, Joseph Paul Behari, Jr., filed his 2000 New York State Nonresident and Part-Year Resident Income Tax Return on September 17, 2007. Petitioner reported New York State income tax due of \$834.12, New York State tax withheld of \$1,142.82 and thus an overpayment of tax of \$308.70. Petitioner claimed a refund of the overpayment on his return.

2. The State tax withheld as reported on the return was so withheld by petitioner's employer during 2000.

3. Petitioner did not file for an extension of time to file his 2000 return.

4. By letter dated November 26, 2007, the Division of Taxation advised petitioner that his claimed refund was denied as untimely.

***CONCLUSIONS OF LAW***

A. A claim for refund of an overpayment of personal income tax must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever is later (Tax Law § 687[a]). Periods of limitations "must be strictly adhered to" (*Kavanagh v. Noble*, 332 US 535, 539 [1947]) and are "not open to discretionary change by the courts no matter how compelling the circumstances" (*Cohen v. Pearl River Union Free School Dist.*, 70 AD2d 94, 99, 419 NYS2d 998, 1001 [1979] *revd on other grounds* 51 NY256, 434 NYS2d 138 [1980]).

B. For purposes of section 687, income tax withheld during any taxable year is deemed to have been paid by the taxpayer on April 15 of the following year (Tax Law § 687[i]). Accordingly, the tax withheld from petitioner during 2000 is deemed to have been paid on April 15, 2001. The return at issue was filed on September 17, 2007. The three-year period of limitations is therefore applicable in this case.

C. Tax Law § 687(a) further provides that if the claim is filed within the three-year period, the amount of refund allowable may not exceed the portion of tax paid within the three-year period immediately preceding the filing of the refund claim plus the period of any extension of time for filing the return.

D. Petitioner did not pay any portion of his 2000 overpayment of tax claimed as a refund during the three-year period immediately preceding the filing of the refund claim (*see* Finding of Fact 2). Petitioner's refund claim was filed on September 17, 2007, as part of his 2000 income tax return. The three-year period immediately preceding petitioner's refund claim thus runs from September 17, 2004. As noted previously, the overpayment, i.e., the income tax withheld, was deemed paid on April 15, 2001, more than six years before the filing of the refund claim. The Division therefore properly denied petitioner's refund claim pursuant to Tax Law § 687(a).

E. The petition of Joseph Paul Behari, Jr. is denied, and the Division of Taxation's disallowance of petitioner's refund claim is sustained.

DATED: Troy, New York  
June 12, 2008

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE